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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 417

THE UNITED STATES OF AMERICA AND MESTA MACHINE COMPANY, APPELLANTS

v.

COUNTY OF ALLEGHENY, PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania (R. 79), is unreported. The opinion of the Supreme Court of Pennsylvania (R. 95) is reported at 347 Pa. 191.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered May 12, 1943 (R. 90, 102). The appellants' petition for reargument was denied August 12, 1943 (R. 91, 123). The petition for allowance of an appeal was filed September 9,

1943 (R. 124), and the order of the Supreme Court of Pennsylvania allowing the appeal was entered September 15, 1943 (R. 125–126). This Court, by order of October 25, 1943, postponed further consideration of the question of jurisdiction until the hearing on the merits (R. 129). The jurisdiction of this Court rests on Section 237 (a) of the Judicial Code, as amended, and is supported by the authorities cited in Appellants' Statement as to Jurisdiction. Also see footnote 6, p. 13, *infra.*

QUESTION PRESENTED

Whether, under the Constitution of the United States, a Pennsylvania real property tax statute which authorizes a county to assess the machinery in a mill as a part of the real estate may validly be applied to machinery owned by the United States and located in a mill of a private person.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in Appendix A, *infra,* pp. 58–59.

STATEMENT

The facts were in large part stipulated and may be summarized as follows:

Mesta Machine Company is a Pennsylvania corporation, having its principal place of business in the Borough of West Homestead, County of Allegheny, Pennsylvania (R. 24). On or

about November 1, 1940, the Company entered into a contract with the United States, No. W-ORD-486, to manufacture for the United States a quantity of large field guns (R. 25). A copy of the contract, and of an amendment thereto, dated February 24, 1941, appears in the record (pp. 25, 35, 37–70. Ex. 1).[1]

The contract was in four parts or titles. Title I was a "Cost-plus-a-fixed-fee equipping" contract, and dealt with the procurement and installation of machinery and machine tools necessary for the manufacture of the guns in a building owned by Mesta, at the Government's expense (R. 41–48); Title II was a lease of this equipment by the United States to Mesta (R. 49–50); Title III was a fixed-price contract for actual manufacture of the guns (R. 51–59); Title IV contained definitions, stipulations respecting wages, hours, and working conditions, and other matters relating to the entire contract (R. 59–64), none of which is important to this controversy.

Under Title I, the necessary machinery was to be supplied in three possible ways: Under Article I–A Mesta, called the "Contractor," operating on a cost-plus-a-fixed-fee basis, could purchase the machinery, or it could produce the machinery

[1] On request of the War Department, there were deleted from the contract certain figures relating to quantities, size and costs of the guns, which should not be disclosed, but these are not material to the controversy.

itself (R. 41); but under Article I–D–2 the Government reserved the option to furnish any or all of the machinery if it so desired (R. 43). Article I–A further provided that Mesta should install all the machinery, or cause it to be installed, in Mesta's plant at West Homestead, Pennsylvania (R. 41).

Under these provisions, Mesta manufactured one machine and sold it directly to the United States (R. 26, 28–29). Eight gun-boring lathes and two rifling machines owned by the United States were sent to the Mesta building from the Watervliet Arsenal at Watervliet, New York (R. 23, 26, 31, 37, Ex. C). The remainder of the machinery was purchased by Mesta from other machine-tool manufacturers and was then resold by Mesta to the United States, through the process of reimbursement for cost under the contract (R. 26). All of the machinery was installed in the building owned by Mesta (R. 31).

The details of the purchase and delivery of the machinery not already owned by the Government are set forth in the record (pp. 26–31, 35, 70–78, Exs. 2–11). They show that each purchase was made with approval of a representative of the War Department, the Contracting Officer; that in each instance Mesta was reimbursed by the United States for the cost; and that in each instance the Contracting Officer, through his representative, the Officer in Charge, inspected and accepted the machinery.

Article I–H specified that title to all tools, machinery, equipment, and supplies purchased or furnished by Mesta should vest in the Government upon inspection and acceptance by the Contracting Officer at the scene of the work. The provision was as follows (R. 46):

> The title to all work under this Title I, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under this Title I shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

Article I–D of the contract provided as follows (R. 42):

> 1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work under this Title I as may be approved or ratified by the Contracting Officer and as are included in the following items:
>
> (a) All labor, material, tools, machinery, equipment, supplies, services, power, and

fuel necessary for either temporary or permanent use for the benefit of the work under Title I.

* * * * *

Under Article I–C Mesta was awarded a fixed fee of $1 as consideration for performance of Title I (R. 42). A later amendment allowed substantial compensation for work done on the machinery furnished by the Government, above mentioned, which was already owned by the United States and which Mesta agreed to repair and recondition (R. 25, 35, 65–70, Ex. 1).

Article I–K empowered the United States to terminate the contract by notice in writing to Mesta at any time termination was deemed advisible or necessary in the interest of the Government (R. 47).

Title II of the contract, providing for leasing of the equipment to Mesta, read in part as follows (R. 49):

Article II–A—Subject Matter

1. The Government hereby leases to the Contractor the Government-owned equipment, which the Contractor will have installed pursuant to the provisions of Title I hereof.

2. The Contractor shall maintain and keep in repair the Government-owned equipment described in Title I hereof and leased to the Contractor hereby.

Article II–B—Term

1. The term of this lease shall be for the period during which Guns, * * * complete, are manufactured by the Contractor under Title III of this contract or any later supplement or amendment of this contract.

* * * * *

Article II–C—Rental

1. The Contractor agrees to pay to the Government in advance, as rental for the term herein created, the sum of One Dollar ($1.00).

By Article II–D–1 (R. 49), Mesta was prohibited from using any of the leased equipment for any purpose other than the manufacture of the guns, as provided in the contract. Article II–E stipulated that upon termination of the contract Mesta must remove the equipment from its plant and ship it, at the expense of the Government, to a point designated by a representative of the War Department. It reads as follows (R. 50):

In the event of termination of Title III of this contract, in accordance with the terms of Article III–K [2] of title III hereof, or in the event of complete performance of this contract by the Contractor and unless a new contract or contracts satisfactory to the Contractor as to price, delivery schedule, and quantities have been entered into

[2] Erroneously shown as II–K in the printed record.

and unless a contract to maintain the equipment in a stand-by condition has been entered into by the Government with the Contractor, the Contractor shall at the expense of the Government within ninety (90) days thereafter remove from the premises of the Contractor and ship by railroad to a point designated by the Contracting Officer all of the equipment leased to the Contractor for the performance of this contract, in good condition subject to fair wear and tear and depreciation.

Title III (R. 51–59) of the contract provided for the manufacture of guns at a fixed price per gun, and Article III–K, like Article I–K, specified that the contract was terminable by written notice to Mesta at the will of the Government (R. 57).

One of the assessors for the County who made the present assessment testified that the machinery was installed in such manner that it could be removed without any damage to the building (R. 21). There was no evidence to the contrary.

The real property owned by Mesta, on which the machinery and machine tools were installed, had already been valued and assessed in the triennial assessment previously made for the years 1940, 1941, and 1942. In January 1942, the Board of Property Assessment, Appeals, and Review revised this assessment, for the year 1942, increasing it by adding to the valuation, among other

items, the value of the machinery in question, fixed at $618,000 (R. 18, 23, 33, 34, 35–37, Exs. A, B, C).

The assessment was made under the Act of May 22, 1933, P. L. 853, as amended (72 P. S., Sec. 5020–201, *et seq.*), and particularly Section 201 thereof, which provides as follows:

> Subjects of Taxation Enumerated.—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school, and poor purposes at the annual rate:
>
> (a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation.
>
> * * * * *

After notice of the revision to Mesta and a hearing before the Board of Property Assessment, Appeals, and Review, the latter, on April 20, 1942, notified Mesta of its decision to maintain the assessment based upon the machinery (R. 33). Mesta filed an appeal to the Court of Common Pleas of Allegheny County on May 20, 1942 (R. 1).

Thereafter, on June 29, 1942, and again on July 29, 1942, at the request of the United States, the Board held further hearings and considered

objections to the tax urged on behalf of the United States and Mesta. On July 30, 1942, the Board advised Mesta that it reaffirmed its decision of April 20, 1942, to maintain the assessment. (R. 33–34.)

The tax attributable to the assessment of the machinery, amounting to $5,137.12, was paid by Mesta, under protest, on July 30, 1942 (R. 34).

On September 16, 1942, Mesta filed an amended petition of appeal to the Court of Common Pleas of Allegheny County (R. 2–4), and the United States filed a petition for leave to intervene (R. 5–8). The intervention was allowed on October 19, 1942 (R. 14), and the Government has participated in the litigation continuously since that date.[3]

Mesta's amended petition and the intervening petition of the United States attacked the assessment upon two grounds: First, they alleged that under the Pennsylvania real property tax statute machinery belonging to anyone other than the owner of a mill was not to be considered a part

[3] The petition for leave to intervene contained in paragraph 14 (R. 7–8) an allegation that the United States would be required to reimburse Mesta Machine Company for the amount of any taxes which the company might be required to pay on account of this assessment. The reimbursement provision upon which this allegation was based appears in Article I–D (g) of the contract (R. 43). Rule 2327, Pennsylvania Rules of Civil Procedure (see 337 Pa. 24a), permits any party to intervene where the entry of a judgment will impose upon such party a liability to indemnify the party against whom the judgment is entered.

of the mill for the purposes of real property tax assessments (R. 3, 7);[4] and second, that the applicable Pennsylvania taxing statutes, as construed and as here applied, were invalid because repugnant to the Federal Constitution (R. 4, 7). Under the practice pertaining to tax appeals like the present in Pennsylvania, the County was not required to file an answer on the merits of Mesta's petition, and filed none. Its only answer was in opposition to the Government's petition for leave to intervene (R. 8–9).

The Court of Common Pleas, in an opinion filed on January 18, 1943 (R. 79–89), held that the Pennsylvania real property tax statute, as properly construed, authorized the assessment of the machinery in a mill to the owner of the mill as a part of the real estate, whether the machinery belonged to the owner of the mill or to some other private person. But upon its finding that the machinery here involved was "owned by the United States" (R. 80), the court further held that under the Federal Constitution the statute; as so construed, could not validly authorize the assessment to Mesta of the machinery. The assessment was set aside (R. 89).

The County of Allegheny appealed to the Supreme Court of Pennsylvania, including as as-

[4] The property would not be subject to tax as personalty, for Pennsylvania imposes no tax upon tangible personal property. See *Patterson* v. *Delaware County*, 70 Pa. 381, and *Dravo Contr. Co.* v. *Grambling*, 45 Pa. Super. Ct. 72.

assignments of error the judgment and the admission of evidence of the Government's title to the machinery (R. 93–95). The County contended that the evidence was irrelevant because the assessment was not made against the Government or the Government's property, but against Mesta Machine Company, and that therefore the statute authorizing it did not offend the Constitution of the United States.[5]

On May 12, 1943, the Supreme Court affirmed the construction placed upon the statute by the Court of Common Pleas, as to which there is no further issue, but reversed its judgment on the constitutional question and restored the assess-

---

[5] In its brief (p. 23) the County urged that the machinery became a part of Mesta's real estate upon installation thereon, and that the United States had only a "reversionary interest after the termination of the contract." This would seem an attempt to divest the United States of title to its property. But when this view was challenged at the oral argument, counsel for the County, in response to direct question of the Chief Justice, stated unequivocally that there was no contention that title to the property was in Mesta "except for tax purposes."

Although the record does not reflect the exact dates of acceptance and installation of all of the machinery, there is no doubt but that it was wholly accepted and installed before the assessment, which occurred in January 1942. *Supra*, pp. 4–5. This is also shown by the assessment itself, as well as by the testimony of the assessor, that he had inspected the machinery on the premises in October 1941 (R. 19). Consequently, the United States had become the owner of and had acquired legal title to all the machinery well before the assessment. No such question as that presented in *United States* v. *Alabama*, 313 U. S. 274, is involved in this case.

ment (R. 95–102). Two judges dissented (R. 102–110). The court recognized that at the time of the assessment the United States owned the machinery and that "legal title to it" was "actually in the Federal Government" (R. 100). The court nevertheless held the assessment valid, on the ground that it was not made against the Government but against an independent contractor, and could be collected as a personal liability of the latter without recourse to the property (R. 99–100).[6]

SPECIFICATION OF ERRORS TO BE URGED

The assignments of error are set out in the record, pp. 124–125. The Supreme Court of Pennsylvania erred:

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[6] In view of the court's holding, it seems clear that an appeal will lie under Section 237 (a) of the Judicial Code, as amended: The "validity" of the Pennsylvania statute was "drawn in question * * * on the ground of its being repugnant to the Constitution" of the United States by identical allegations in paragraph 7e of the petition of Mesta (R. 4), and paragraph 13e of the intervening petition of the United States (R. 7), and the decision of the State court was "in favor of" the "validity" of the statute. The following cases, among others, are believed to sustain the jurisdiction of the Court: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151. If for reasons not apparent to us an appeal is not available, the appeal papers should be treated as a petition for certiorari under paragraphs (b) and (c) of Section 237 of the Judicial Code. *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649. With respect to the importance of the problem presented, bearing upon the allowance of certiorari, we refer the Court to the discussion *infra*, pp. 51–54.

1. In holding that the Act of May 22, 1933, P. L. 853, Art. 2, including Sec. 201 thereof, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, is constitutional insofar as it purports to authorize the assessment to Mesta Machine Company of property owned by the United States.

2. In holding that the assessment of Government-owned machinery as a part of the real estate of Mesta Machine Company is not in violation of, or repugnant to, the Constitution of the United States.

3. In holding that the evidence of Government ownership of the machinery which was assessed to Mesta Machine Company was irrelevant, and therefore incompetent and inadmissible.

4. In failing to hold that the Act of May 22, 1933, P. L. 853, Art. 2, including Sec. 201 thereof, as amended by the Act of July 2, 1941, P. L. 219, Sec. 1, is unconstitutional as applied to property belonging to the United States.

5. In failing to hold that the assessment of Government-owned machinery to Mesta Machine Company was in violation of, and repugnant to, the Constitution of the United States, and therefore invalid and void.

6. In failing to hold that the evidence of Government owership of the machinery which was assessed to Mesta Machine Company was relevant and competent and properly admitted by the Court of Common Pleas of Allegheny County.

SUMMARY OF ARGUMENT

I

The tax was assessed under a Pennsylvania statute which, as construed, provides that machinery shall be regarded as a part of the real estate upon which it is located and that the value of the real estate may be taxed to the registered owner, here the Mesta Machine Company. The Pennsylvania law taxes only the full ownership interest. Accordingly, the full assessable value of machinery owned by the United States was included in the instant assessment. In normal operation the tax becomes a first lien upon property subject to assessment and may be satisfied by a sale.

The scheme of the Pennsylvania law is to tax the real owner of the property. The record title holder is personally liable, but the taxing authority, if it so elects, may proceed directly against the real owner. And as between the real owner and the registered owner the latter is but secondarily liable and may recover from the real owner any payments made on account of the tax. In short, the tax is upon the real owner of the property. Under the decisions of the Supreme Court of Pennsylvania property of the Commonwealth situated as was the property of the Federal Government here probably could not be subjected to a county tax.

In this case, the state court apparently ignored the scheme of its own law and regarded Mesta as

the real taxpayer. But the court did not question any of its previous decisions dealing with the nature of the tax. The state court did not say whether in the present situation the Pennsylvania law purports to give Mesta a right of reimbursement for the tax against the United States. If it does, it is clear at once that the state law places the tax on the Government. But if it does not, the Pennsylvania law discriminates against Mesta solely because of its dealings with the Federal Government, since to all other persons similarly situated a remedy of reimbursement is provided. And that such a discriminatory exaction is invalid is clear. The Government could neutralize the discrimination by reimbursing Mesta for the tax, but this circumstance is of no avail to save the statute unless the state could impose a tax, collectible through the contractor, upon the United States in the first place. Thus, whether or not in the circumstances of the instant case the state law purports to give Mesta a right of reimbursement against the United States, we are faced with the same question. That question is whether a state property tax is invalid, though collectible from a private person who deals with the United States, where the tax is on the property of the United States and, apart from the fact of ownership by the United States, such private person and the state itself could, under the state law, require payment from the owner.

II

For 125 years no decision of this Court has questioned that, in the absence of congressional consent, the Government's activities and its property, real or personal, are immune from taxation by the states and their political subdivisions. The Government's immunity stems from the structure and implications of the Federal Constitution and the supremacy clause of Article VI. With respect to the Government's property, the immunity is further strengthened by Section 3 of Article IV, which grants to Congress the power to make "all" needful rules and regulations respecting such property. As with analogous decisions under the Commerce Clause, both Congress and the states have accommodated their laws to the decisions of the Court holding the Government's property immune from taxation.

There are intensely practical reasons supporting the Government's immunity from state and local taxation. Unlike the case of private persons, the activities and property of the general government are those of all the people and they are not dependent upon the authority or protection of any state. The claim that the Government should pay a price for conducting activities or maintaining property within the boundaries of a state overlooks the benefits and protections afforded the states by the Federal Government, whether in peace or in war, and denies the very basis of the

federation. State taxation of the Federal Government serves to appropriate the property of the whole for the benefit of a part. A second practical basis of the Government's immunity rests in the welter of administrative difficulties which would inevitably follow if the Government were to be subjected to the contradictory requirements of state legislation. Nor can the argument be successfully maintained that the Government should be subjected to state taxation, but that in deference to the federal principle there should be no authority of enforcement against it. It must be presumed that the Government will attempt to comply with requirements which the states may *constitutionally* impose. Mere immunity from enforcement, moreover, would in many circumstances be no immunity at all since the states would be free to proceed against private persons with whom the Government deals. The Court has never held that the Government's immunity from taxation is merely coincidental with its immunity from suit or the immunity of its property from seizure.

At least since *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, it has been settled explicity that a state may not impose an *ad valorem* tax upon property of the United States even where it proceeds solely against a private person for collection. The line of decisions represented by this case is of unshaken authority and is firmly grounded in the practical bases of the Govern-

ment's immunity. In the instant case the Government has contracted to reimburse Mesta for any "applicable" state and local taxes which it may be required to pay with respect to the Government's property. However, the Government's immunity does not arise from this or any other contract. The decisive fact is simply that it is the Government's property which is involved and, Congress not consenting, an *ad valorem* tax upon that property cannot be sustained.

If the foregoing circumstance were not sufficient in itself, the instant tax would fall for another reason. The tax is not imposed upon the contractor as a part of the price which he must pay for the benefits and protection afforded him by state authority. Under the scheme of the Pennsylvania law, the record title holder serves as a mere conduit for the imposition of that burden of citizenship upon the real owner of the property, the person in the position here of the United States. In the several cases in which this Court has sustained excises upon a contractor's business or income, the tax has in fact been upon him and not upon someone else. Where the tax has been upon the person in the position which the Government occupies in the particular transaction under scrutiny, the tax has been held invalid.

Congress has long understood that absent action on its part the Government's property is immune from state and local taxation. When believing

such action advisable, Congress has framed specific legislation to waive the Government's immunity in certain situations or to authorize payments in lieu of taxes. Congress plainly has not waived the immunity of the property involved in this case. In fact, Congress has repeatedly refused to adopt bills which would subject property acquired by the Government under the war program to state and local taxation even where, unlike the instant situation, the same property had previously been carried on the tax rolls.

The entire problem of the extent to which the Federal Government should make contributions to state and local governments is extremely complex. The fact is that state revenues have benefitted exceedingly in consequence of the unusually high level of business activity due to the war effort. Through only the War and Navy Departments and the Maritime Commission, the Government owns at the present time about $7,500,000,000 in property which is located on private lands or which is operated by private contractors. Whether, or to what extent, this vast holding should be subjected to state and local taxation would seem to be at the very least a matter of fair legislative debate. The nature of the problem brings further support to the long line of decisions of this Court holding the Government's property immune in the absence of express treatment of a particular situation by legislative action

The critical facts are simple. The Federal Government owned eight gun-boring lathes and certain rifling machines as a part of its stocks at the Watervliet Arsenal, New York. It caused these and other machinery, legal title to which was acquired by the Federal Government and which is on the same footing as the Watervliet machines,[7] to be installed in a mill owned by the Mesta Machine Company in Allegheny County, Pennsylvania. This was done pursuant to a contract under which Mesta was to manufacture large field guns for the United States Army. The machinery was "leased" to Mesta at the nominal rental of one dollar. It could be used only for work on the field guns, and the entire contract could be terminated at any time on the Government's election. Upon the termination of the contract the machinery, which could readily be removed, was to be withdrawn from the mill and put to such further use as its owner, the Government, desired.

A further fact requires brief notice. By force of Article I–D (g) of the contract (R. 43), the Government was required to reimburse Mesta for any "applicable" state or local taxes paid on account of the contract on "plant" or "equip-

[7] See pp. 4–5, 11–13, including footnote 5, p. 12, *supra*. As stated, the trial court found that the machinery was owned by the Federal Government (R. 80), and the Supreme Court of Pennsylvania did not question this fact (R. 100).

ment." If the tax here involved is valid, it will be the Government, not Mesta, which is out of pocket. We refer to this further, *infra*, p. 40. This fact was important in supporting the right of the United States to intervene in the state court (R. 9–14). But our position should be made perfectly clear. The immunity of the Government's property from state and local taxation which we assert does not rest on the contractual obligation of reimbursement. The Government has not contracted itself into an immunity. The immunity arises simply because it is the Government's property which is taxed.

I

THE NATURE OF THE PENNSYLVANIA TAX

The tax was assessed under the purported authority of the Pennsylvania Act of May 22, 1933, P. L. 853, Article II, Section 201, as amended by the Act of July 2, 1941, P. L. 219, Section 1 (Appendix A, *infra*, p. 58). The tax, at least in many aspects, is the traditional type of real property exaction. The 1933 Act, as amended, provides that all "real estate," including "mills," shall be "valued" and assessed. The Pennsylvania statutes do not authorize the taxation of any interest in such property less than the full ownership interest (*Mint Realty Co.* v. *Philadelphia*, 218 Pa. 104, 112–113). As both opinions in the state su-

preme court recognized (R. 96, 104), the assessment included the full assessable value of the Government-owned machinery, listed at $618,000 (R. 16–17, 23, 33, 35–36, 36–37, Exs. A, B, C).

In the state courts, the Government and Mesta raised questions whether the Pennsylvania statutes authorized the taxation of machinery as real estate, and, if so, whether they authorized taxation of machinery to the owner of the land where the machinery was in fact owned by another, and particularly where, as here, it was owned by the United States. The state supreme court held against the Government and Mesta on these issues (R. 97–99); presenting questions of statutory construction, they are not here for review. But in so applying the state statutes the supreme court, as we have seen, did not deny that the United States was the true owner of the machinery.* The majority of the court did not rule that Mesta had any legal or equitable interest in the machinery (R. 98–99), and the minority pointed out that "be-

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*Of course, no state by statute or decision can divest the United States of any interest in its property. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 350; *Carpenter* v. *Shaw*, 280 U. S. 363, 367; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389. Moreover, it may be noted that the assessment of January 1942 was not made on the theory that the Government's machinery merely enhanced the value of the land and buildings concededly owned by Mesta. The machinery was listed as a separate, taxable item. (R. 18–19, 22–23, 35–37.)

fore, at, and ever since the imposition of the tax, not only the legal title but the entire beneficial ownership of the machinery was solely in the United States" (R. 104). The court held simply that "for tax purposes" (R. 98, 100) the machinery was to be regarded "as the property of the Mesta Company." So far as the constitutional question of immunity before this Court is concerned, it is plainly immaterial whether Pennsylvania law regards the machinery as real estate or personalty, or whether for some purposes it chooses to attribute ownership to the true owner, the Federal Government, or to someone else, as a fictional owner.

Consistent with its character as a property tax, the Pennsylvania statutes provide that the tax shall become a first lien on the property subject to assessment, and may be satisfied by a sale of the property. Act of June 4, 1901, P. L. 364 (Appendix A, *infra*, pp. 58–59); *Mint Realty Co.* v. *Pennsylvania, supra.* The state court did not question the fact that, by force of Pennsylvania

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• This is underscored by the court's holding (R. 99) that—

"The record showed that title to the land was in the Mesta Company, and the assessor was not obliged to go further,"

as well as by its statement (R. 100) that the machinery was a proper subject of taxation although "legal title to it is actually in the Federal Government," and by its holding (R. 102) that evidence of the actual ownership was *irrelevant* and *improperly admitted*.

law, the tax here involved carried with it a first lien on the machinery or that, in normal operation, the machinery could be sold to satisfy the tax. It stated, however, that "the paramount rights of the government in the machinery could not be divested or in any way affected" (R. 100), and apparently considered this sufficient to sustain the tax.[10]

The scheme of the Pennsylvania statutes is to tax the real owner of the property. "It is the policy of the law to make the real owner pay the tax * * *" (*Pennsylvania Co.* v. *Bergson*, 307 Pa. 44, 53). The record title holder becomes personally liable for the tax (307 Pa. at p. 51; *N. Phila. Tr. Co.* v. *Heinel Bros., Inc.*, 315 Pa. 385; *Trust Co.* v. *Bank and Tr. Co.*, 326 Pa. 262, 264). But the taxing authority, if it so elects, may proceed directly against the real owner (307 Pa. at pp. 52–53; 326 Pa. at pp. 264–265; *Pennsylvania Stave Company's Appeal*, 236 Pa. 97; *Bemis* v. *Shipe*, 26 Pa. Super. Ct. 42), and the court recognized this to be true in its opinion in the instant

[10] To this the dissenting opinion in the court below responded (R. 108) that the admission that the Government's machinery could not be sold for taxes constituted "a backhanded acknowledgment of the weakness of the majority viewpoint," since the property was subjected to a lien under Pennsylvania law and, absent any question of immunity, could have been sold to satisfy the tax. Also see the dissenting opinion at R. 107–109. We think the minority's point was well taken. (See *infra*, pp. 28–31, 36.)

case (R. 99). Moreover, "as between the real owner and the registered owner, the latter is secondarily liable and may therefore recover from the real owner sums by him paid on account of the tax" (*Trust Co.* v. *Bank and Tr. Co., supra;* see *Pennsylvania Co.* v. *Bergson,* 307 Pa. at p. 53). As between lessee and lessor, a statute expressly so provides. Act of April 3, 1804, P. L. 517 (Appendix A, *infra,* p. 59). It is thus abundantly clear that the practice of collecting from the record title holder the taxes imposed upon another's property is nothing more than a device to save the local tax officers "trouble and expense" (307 Pa. at p. 51) and so to aid in the "effective administration" (*Id.,* at p. 56) of the tax law.[11] In analyzing state taxing statutes, this Court has looked to the person ultimately liable for payment of the tax and has determined whether, absent the immunity question, that liability was on the person in the position of the private party (Mesta, here) or on the person in the position of the United States. See e. g., *Alabama* v. *King & Boozer,* 314 U. S. 1, 9–14; *Curry* v. *United States,* 314 U. S. 14, 17, 18.[12] There would seem to be no

[11] The device is not unusual. For discussion of a similar statute see *Boston* v. *Quincy Market Cold Storage Co.,* 312 Mass. 638.

[12] In the *Curry* case, the Court sustained a state use tax collected from contractors as purchasers, reasoning that it was laid "upon them [the contractors] rather than the indi-

question that, apart from any question of immunity, ultimate liability for payment of the Pennsylvania tax is on the actual owner of the property and hence on the person in the position of the Government here.

It is of some significance in this connection that the state supreme court apparently refuses to permit the taxation of property owned by the state or its subdivisions in circumstances analogous to those here. See *Dornan* v. *Phila. Housing Authority,* 331 Pa. 209; *Com. State Emp. System* v. *Dau. Co.,* 335 Pa. 177. The first case involved the right of the state to exempt from local taxes a slum-clearance project. The second involved a county assessment against property owned by the state on behalf of the State Employe's Retirement System, a portion of which was rented to private commercial tenants. In both the property was held exempt from county taxes notwithstanding a provision found in Article IX of the Pennsylvania Constitution forbidding the grant of exemption to property not used for public purposes. In the second case, the court said (p. 185):

> The fact that revenue is derived from the property or that it is leased for private use does not preclude the existence of a public use by the Commonwealth.

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vidual [there, the Government] with whom they enter into a cost-plus contract like the present one * * *" (p. 18).

In the present case, the court below cited two Pennsylvania cases where a tax was sustained (R. 101). But in both it was a private person, and not the state or a subdivision, who owned the property actually taxed. *County of Franklin* v. *McClean*, 93 Pa. Super. Ct. 165; *Kittanning Academy* v. *Kittanning Boro.*, 8 Pa. Super. Ct. 27.[13]

As an integral part of the scheme of taxing the real owner, the state law, as we have seen, gives the record title holder a right of reimbursement against the real owner. Although acknowledging that the Government's ownership of the property could not be affected by the state (*supra*, p. 25), the court failed to say whether in the present situation the state law purports to give Mesta a right of reimbursement against the United States. Consistent with its silence on this point, the court apparently sought to ignore the normal operation of its own law and to portray Mesta as the real taxpayer (R. 100). But the court did not question any of its previous decisions

[13] In the *McClean* case the "property assessed for taxation" was "a house situated upon leased land" owned by the Commonwealth. The private lessee owned the house and had the right to remove it at the end of the lease. (93 Pa. Super. Ct. at pp. 167, 171.) The dissenting opinion, also, noted this case (R. 106).

Of course, even if the Pennsylvania law were otherwise this would have no direct bearing on the constitutional question presented here, for a state is free to tax its own property as it chooses.

dealing with the nature of the tax and it can make no difference whether or not the state law purports to give Mesta a remedy of reimbursement against the United States. If it does purport to give Mesta such a remedy, it is evident at once that the scheme of the state law is to place the tax on the Government. But if, because Mesta deals with the United States, the state law fails to give it a remedy of reimbursement which is available to all others in similar dealings with private individuals, there is a patent discrimination solely because Mesta does business with the Federal Government. And that even a tax imposed solely upon a private person is invalid under the immunity rule if it discriminates because of dealings with the Government is clear. In this situation, to be sure, the Government could neutralize the reluctance of contractors to deal with it, which would inevitably be occasioned by the difference in the treatment accorded them under state law, by agreeing to reimburse them for the tax. But this would not validate the tax, it seems obvious, unless the state could validly impose a tax upon the Government, collectible through the contractor, in the first place. *Miller* v. *Milwaukee*, 272 U. S. 713.[14] Thus, starting with

[14] This case held invalid a state income tax on a shareholder as applied to dividends allocable to corporate income consisting of interest on United States bonds. The corporation could not be taxed on such interest, due to an express exemption provided by federal law. The scheme

the assumption that the state law does not give the contractor a right of reimbursement against the Government, we end up at the same unanswered question to which the contrary assumption leads us, namely whether the County may enforce against the contractor a tax which is on the person in the position of the Government, and which, absent any question of immunity, would be

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of the state law was to tax income to corporations, but it provided that where income was exempt in the hands of the corporation, dividends allocable to such corporate income should be taxed to the shareholder. On this basis the state sought to sustain the tax. The opinion of the Court, delivered by Mr. Justice Holmes, reasoned that the tax on the shareholder was discriminatory, since dividends allocable to Government bond interest were taxed and other dividends were not. A concurring opinion, joined in by Justices Brandeis and Stone, reasoned that the tax was invalid because the state was seeking indirectly, by taxing the dividend in hands of the shareholder, to impose the forbidden tax on Government bond interest.

For purposes of the present case, we think it unnecessary to choose between these two grounds of decision. The decisive question in the *Miller* case, under either view, was whether Government bond interest could be taxed in the hands of the recipient, the corporation. Since it could not be, the tax was not saved by shifting it to the dividend in the hands of the shareholder. Similarly, the decisive question in this aspect of the present case is whether Government property can be subjected to a tax collectible from a record title holder who is then given a right over against the real owner. If it cannot be, the tax cannot be saved by denying the record title holder a right of reimbursement because the United States is the owner of the property, and thus shifting the tax to the contractor.

on the Government. See *Alabama* v. *King & Boozer*, and *Curry* v. *United States, supra*, (p. 26). This we discuss, *infra* (pp. 41–47).

II

ABSENT THE CONSENT OF CONGRESS, THE PROPERTY OF THE FEDERAL GOVERNMENT IS CONSTITUTIONALLY IMMUNE FROM STATE AND LOCAL TAXATION. THE IMMUNITY IS NOT DISSIPATED BY THE ELECTION OF THE TAXING AUTHORITY TO PROCEED AGAINST SOMEONE ELSE FOR COLLECTION

Since *McCulloch* v. *Maryland*, 4 Wheat. 316, no decision of the Court has questioned that, lacking congressional consent, the Government's activities and property, real or personal, are immune from taxation by the states and their political subdivisions.[15] Illustrative decisions holding the Government's property immune are: *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151;[16] *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496; *United States* v. *Rickert*, 188 U. S. 432; *Irwin* v.

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[15] Two unreported cases to the contrary were apparently affirmed by an equally divided Court at the December Term, 1849. Their facts are stated in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 175–177. One, *United States* v. *Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach* v. *Philadelphia County*, affirmed a decision that the United States was liable to local taxation on the U. S. Mint. These decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

[16] See particularly 117 U. S. at pp. 156–158 for Mr. Justice Gray's discussion of the views of the Marshall Court con-

Wright, 258 U. S. 219; *Clallam County* v. *United States*, 263 U. S. 341; *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89; *Maricopa County* v. *Valley Bank*, 318 U. S. 357; *Mayo* v. *United States*, 319 U. S. 441. In general, the Government's immunity stems from the structure and implications of the Federal Constitution and the supremacy clause of Article VI. With respect to the Government's property, the immunity is buttressed by Section 3 of Article IV, Clause 2, which grants to Congress the power to make "all needful rules and regulations respecting * * * property belonging to the United States * * *".[17] The power to make "all" needful rules and regulations is an exclusive authority. *Wisconsin Railroad Co.* v. *Price County, supra*, at p. 504; see also *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600, 610.

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cerning the immunity of the Government's property, as distinct from the property of a Government "agent" who had his own private purposes to serve.

[17] Compare the language of the Commerce Clause, Article I, Section 8, which does not in terms bar state regulation of interstate commerce prior to congressional action. Notwithstanding, where uniform rules national in scope are required, the states may not act even where Congress is silent. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Welton* v. *State of Missouri*, 91 U. S. 275, 282; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 212; *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307; *Kelly* v. *Washington*, 302 U. S. 1, 14; *Milk Board* v. *Eisenberg Co.*, 306 U. S. 346, 351.

Even if it were conceivable that the law of the Constitution might have developed otherwise, so as to subject the Government to at least non-discriminatory state taxation until Congress declared it immune, the principle is now well and firmly imbedded in constitutional law. As with analogous decisions holding interstate commerce free from state taxation or regulation in the absence of congressional consent, "Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system" (*Gwin, Etc., Inc.* v. *Henneford*, 305 U. S. 434, 441). In fact, some 40 states have "accommodated" their laws to the rule that the property of the United States is not subject to the taxing power of the state, some by constitution [18] (or by constitution and statute) and others by statute alone.[19]

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[18] The constitutional provisions are as follows: Arizona, Art. 9, Sec. 2; California, Art. 13, Sec. 1; Idaho, Art. 7, Sec. 4; Missouri, Art. 14, Sec. 1; Montana, Art. 12, Sec. 2; Nevada, Sec. 20 (3); New Mexico, Art. 8, Sec. 3; North Dakota, Sec. 176; Oklahoma, Art. 1, Sec. 3 and Art. 10, Sec. 6; South Dakota, Art. 11, Sec. 5; Utah, Art. 13, Sec. 2; Virginia, Sec. 183; Washington, Art. 7, Sec. 2; Wisconsin, Art. 2, Sec. 2; Wyoming, Art. 15, Sec. 12.

[19] The statutes are as follows: 51 Code of Alabama (1940), Sec. 2; Pope's Digest of the Statute of Arkansas (1937), Sec. 13603; 4 Colorado Statutes, Annotated (1935), c. 168, Sec. 4; General Statutes of Connecticut (1930), c. 62, Sec. 1163; Revised Code of Delaware (1935), c. 44, Sec. 1258 (1); Florida Statutes (1941), Sec. 192.06; Illinois Revised Statutes (1941), c. 120, Sec. 500; Burns' Indiana Statutes Annotated (1937), Secs. 64–201; Code of Iowa (1939), Sec. 6944; General

The practical bases of the Government's immunity.—The practical bases of the Government's immunity have been variously stated but, we believe, may be reduced to these: The activities and property of private persons within a state rightly answer to the tax collector in return for the benefits and protection afforded by state authority. The activities and property of the Federal Government, on the other hand, are those of all the people. The activities are not carried on and the property does not exist by the authority of any single state. To claim that the Government should pay a price for conducting activities or maintaining property within a state denies the very basis of our federalism. Any benefits or protection afforded the Government by state authority are compensated, *ex hypothesi,* by the benefits and

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Statutes of Kansas, Annotated (1935), Sec. 79-201; Revised Statutes of Maine (1930), c. 13, Sec. 6; 1 Mason's Michigan Code (1929), Sec. 3395; Mississippi Code (1938 Supp.), c. 61, Sec. 317; 1 Public Laws of New Hampshire (1926), c. 60, Sec. 5; 2 Revised Statutes of New Jersey (1937), Sec. 54: 4-3.3; McKinney's Consolidated Laws of New York, Annotated, Tax Law 59, Art. 1, Sec. 4; North Carolina Code (Michie, 1939), Sec. 7971 (129), (130); 4 Throckmorton's Ohio Code Annotated (1938), Sec. 5351; 7 Oregon Compiled Laws Annotated (1941), Sec. 110-201; 53 Purdon's Pennsylvania Statutes (1936), Sec. 2025; General Laws of Rhode Island (1938), c. 29, Sec. 2; 2 Code of Laws of South Carolina (1942), Sec. 2578; Tennessee Code Annotated (Michie, 1932), Sec. 1085; Vernon's Texas Statutes (1936), Sec. 7150; Public Laws of Vermont (1933), Sec. 590; West Virginia Code (Michie, 1937), Sec. 678.

protection afforded the states by the Federal Government—a consideration which loses none of its force during a critical war. State taxation of the Federal Government necessarily appropriates the property of all, dedicated to national objectives, for the benefit of a part. See *McCulloch* v. *Maryland*, 4 Wheat. at pp. 435–436; *Van Brocklin* v. *State of Tennessee*, 117 U. S. at pp. 155–156; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412.

A second practical basis of the immunity rests in the host of administrative difficulties which would inevitably follow if the Government were to be subjected to the conflicting requirements of state legislation. Even where no unseemly conflicts developed between federal and local officials, no small part of the Government's time would be devoted to the filing of returns, the checking of assessments, the institution of review proceedings, applications for licenses, and the satisfaction of the varied other requirements which are wound up with modern taxation and regulation. The rule of immunity "rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other" (*Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523). The immunity of the Federal Government is required "to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements" (*Mayo* v. *United States*, 319 U. S. 441, 445).

Moreover, these practical needs could not be satisfied by a mere immunity from suit or enforcement, as distinct from taxation. It must be presumed that the Federal Government will strive to comply with requirements which the states may *constitutionally* impose, even though this results in diverting the property of all for the benefit of a few and leaves in its wake administrative problems of great complexity. A mere immunity of the Government from enforcement would in many circumstances be no immunity at all, since states would be free to proceed against private persons with whom the Government deals, or who carry out its work, for the collection of taxes imposed in fact on the United States. The cases have fully recognized the distinction between immunity from suit or enforcement and immunity from taxation or regulation. Cf. *United States* v. *Alabama*, 313 U. S. 274, and *National Bank* v. *Commonwealth*, 9 Wall. 353, with *Van Brocklin* v. *State of Tennessee, supra.* See *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 235; *New Brunswick* v. *United States*, 276 U. S. 547. No case has held that the Government's immunity from taxation is merely coterminous with its immunity from suit or the immunity of its property from seizure.

The decisions invalidating a tax against a private person.—Of the cases cited at pp. 31–32, *supra*, holding the Government's property immune from state taxation, only two (*Clallam County* v. *United*

States, and *Mayo* v. *United States*) involved attempts to collect taxes or fees directly from the United States. In the others it was private persons against whom the local authority proceeded for collection.[20] In the *Van Brocklin* case, which is typical of several, the United States obtained title to three lots upon nonpayment of federal taxes, and held them for some 13 years. After one lot had been redeemed by Van Brocklin and the others sold, the state brought a bill in equity against Van Brocklin and the purchasers to enforce by sale liens for taxes assessed with respect to the years when title was in the United States. It was held that the property was not subject to the asserted liens.

In the *Maricopa County* case, *supra*, decided at the last Term, it was a bank which the county sought to hold liable for the tax. The tax, however, was a personal property tax on the bank's shares, and the shares in question were owned by

[20] Other cases invalidating assessments against third persons are: *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Colorado Co.* v. *Commissioners*, 95 U. S. 259; *Sargent* v. *Herrick*, 221 U. S. 404; *Huesman* v. *Durham*, 165 U. S. 144; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600. For cases where the tax was sustained because equitable title to the entire property during the tax period was vested in the person assessed, see *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Northern Pacific Railway* v. *Myers*, 172 U. S. 589; *Bothwell* v. *Bingham County*, 237 U. S. 642; *New Brunswick* v. *United States*, 276 U. S. 547; *Exchange Trust Co.* v. *Drainage Dist.*, 278 U. S. 421.

the Reconstruction Finance Corporation. Moreover, upon payment, the bank, under Arizona law, was entitled to reimbursement from the shareholder.[21] This Court viewed the tax, not as on the bank, but as on the Reconstruction Finance Corporation. It affirmed an injunction enjoining collection from the bank, since congressional consent to the taxation of the shares in the hands of the Reconstruction Finance Corporation, "though previously granted, has now been withdrawn" (318 U. S. at p. 362).[22]

This line of cases is of unshaken authority and seems rooted in the needs of government. Although in these situations the Government's

[21] The case did not seem to turn on the ultimate liability for payment of the tax but on the fact that it was imposed and measured upon property of the Reconstruction Finance Corporation, without more. To the extent that ultimate liability for payment of the tax was considered important, the case should be considered in connection with those cited *infra*, pp. 42, 44–45.

[22] In *Mayo* v. *United States*, 319 U. S. 441, the state's "stop sale" notice was directed to a federal instrumentality, the county agricultural association, rather than to a private person. But it is perfectly clear from the opinion that the state's action would not have been viewed in a more favorable light had the state officials waited until the bags of fertilizer were in the hands of the farmers, and then seized and sold them for lack of labels evidencing payment of the inspection fee. The district court's decree, affirmed by this Court, was sufficiently broad to prevent such interference with the Government's program at any point. See Record in No. 726, October Term, 1941, pp. 116–117. The Court's opinion cited with approval the *Van Brocklin* case (319 U. S. at p. 447, footnote 11).

property is not handed over directly to the state, the appropriation is nonetheless clear. Thus, in the *Van Brocklin* case the Government had parted with all its interest in the property before the state pressed its claim. But if the state's position had been sustained—so that liens, although dormant while the property remained in the Government, could accumulate during its tenure, and become enforceable upon sale of the property to a private individual—the Government's property in all subsequent instances would obviously have been subjected to a tax in fact if not in form.[23] This was explicitly recognized in *Lee* v. *Osceola Imp. Dist., supra,* where an assessment for local improvements was made against a purchaser of land from the Government after the sale, but for years during which the United States held title. The tax was held invalid as an attempt to "accomplish indirectly the collection of a tax against the United States" (p. 645). And the interference would be even clearer if such a tax were permissible where the Government placed property in the

[23] The same result would have followed, clearly, if the purchaser as transferee had been held liable for a tax accruing during the Government's tenure on some other theory, apart from any question of liens. In the present case the state court did not specify whether in its view a lien attached to the machinery which could be enforced upon any sale of the property to a private purchaser. Presumably this was its view, since under Pennsylvania law a lien attaches to property subject to the tax. In any event, the state court did hold Mesta liable for the tax.

hands of an individual only temporarily, in order to secure its more effective use. In such a case, indeed, the private individual would be unlikely to proceed unless the Government first assumed the liability for the tax, just as the "numerous persons" referred to in the *Mayo* case (319 U. S. at p. 443) were unwilling "to proceed with the distribution of the fertilizer" without protection from the Florida statute. It is to be noted that such an agreement of indemnification was given Mesta in the instant case by its contract (*supra*, p. 22). And in all of these situations the Government, as the real party in interest, is subjected to the same administrative burdens as though the tax were collected directly from the Treasury.[24]

The foregoing decisions establish the general rule that a tax on the Government's property is invalid, and is not saved merely because collection is sought from someone else. The recent decisions of the Court sustaining taxation or regulation of persons who deal with the Government do not take the instant case out of the general rule. This is so both because those decisions did not deal with a tax on the Government's property, and because the scheme

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[24] In the only two similar cases arising in state courts prior to the present proceeding it was held that Government property situated on privately owned land was immune from state taxation, even though collection was sought from the owner of the land. *Andrews* v. *The Auditor*, 69 Va. 115; *People ex rel. Donner-Union Coke Corp.* v. *Burke*, 204 App. Div. 557, affirmed, 236 N. Y. 650. And see Note (1943), 56 Harv. L. Rev. 1332.

of the Pennsylvania law is not to tax the contractor but the owner of the property. The rationale of those decisions supports our position. To them we now turn.

The decisions sustaining a tax against a private person.—In shaping the rule of inter-governmental immunity it has been necessary to reckon with "the competing principle," as it was characterized in *Helvering* v. *Producers Corp.*, 303 U. S. 376, 385, that the power of the government (state or federal) be not crippled and its police power not unduly curtailed. At times the immunity principle has been applied so single-mindedly as to be pressed far beyond its proper confines, so that the immunity became less a protection for the government than a benefit to the individual who dealt with or worked for it.[25] Since *James* v. *Dravo Contracting Co.*, 302 U. S. 134, there has been a distinct narrowing of the area of immunity. For example, in the interest of preserving tax sources and the operation of state police power in such vital matters as the stabilization of milk supplies through price control, it is today held that a contractor is not relieved from nondiscriminatory taxation or regulation despite incidental effects on the Federal

[25] See *Taxation of Government Bondholders and Employees—the Immunity Rule and the Sixteenth Amendment—a Study Made by the Department of Justice*, Washington (1938).

Government. *James* v. *Dravo Contracting Co., supra; Alabama* v. *King & Boozer,* 314 U. S. 1; *Curry* v. *United States,* 314 U. S. 14; *Penn Dairies* v. *Milk Control Comm'n,* 318 U. S. 261. The Court stated in the *Penn Dairies case,* 318 U. S. at p. 269, "* * * the mere fact that nondiscriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation."

The foregoing cases all have a single common denominator. The tax cases dealt with excise or privilege taxes. In each case the subject matter of the tax—the receipt of gross income by the contractor, or his purchase or use of materials—was the measure of payment exacted of all persons similarly situated in return for benefits and protection unquestionably afforded them by the state. In the *Penn Dairies* case, the regulation was applicable to all dealers in aid of a general program designed to assure a stable supply of milk. Apart from the contractual relation between the individual and the Federal Government, the tax or regulation in each of the cases above referred to was plainly applicable to him. But the contractual relationship was not sufficient to give the contractor the status of the Government. In the *Penn Dairies* case, for example,

the dealer was selling milk for himself and not for the Government. Similarly, the Court pointed out in the *King & Boozer* case (314 U. S. at pp. 10–12, 13) that the contractor had no authority to pledge the Government's credit, and that he alone, and not the Government, was the purchaser upon which the tax was imposed. See *Mayo* v. *United States*, 319 U. S. at p. 447.

The basic assumption of all of these cases was that taxation or regulation of the Government itself is invalid. See the *Penn Dairies* case, 318 U. S. at p. 269. Moreover, it was not enough to sustain the tax or regulation that it was the contractor, rather than the Government, who was the immediate object of state power. (In fact, in *King & Boozer* the sales tax was not collected by the state even from the contractor, but from the contractor's vendor.) Rather it appeared in each case that the tax or regulation was imposed upon the contractor as a part of *his* obligation of citizenship, and that the scheme of the state statute was not to make him a mere conduit for the taxation or regulation of the person in the position of the United States. Thus, in the *Dravo* and *Curry* cases the exaction was placed solely on the contractor, and any burden resulting to the Government was of a piece with the economic burden of compensating its contractor. Similarly, in the *King & Boozer* case the sales tax statute required the vendor to pass the tax on to the contractor,

and made him liable as the purchaser, but its force was spent at that point. And in the *Penn Dairies* case the Court observed (318 U. S. at p. 270):

> Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. * * * As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk.

In each of these cases the Court looked to what may be called the "legal incidence" of the exaction—to the outermost point which the state statute sought to control. Since the legal thrust of the tax or regulation was held not to reach the Government, the statute was sustained.

Conversely, where the tax has been on the person in the position of the Federal Government here, the state exaction has been held invalid. *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, like the three preceding tax cases, dealt not with an *ad valorem* property tax but with an excise tax—a state sales tax. The tax was collected by the state from the vendor, a lumber company, rather than from the vendee, a federal land bank. The North Dakota statute, however, required the seller to add the tax to the purchase price and made the amount of the tax a debt due from the purchaser to him. It was therefore clear that by force of the state law the

purchaser was made "liable for the sales tax" (314 U. S. at p. 99). On this basis it was held that the state statute could not be validly applied to purchases by a federal land bank, even though the tax was collected from a private person.[26] And see *Maricopa County* v. *Valley Bank* (*supra*, p. 38, footnote 21); *Pacific Coast Dairy* v. *Dep't*, 318 U. S. 285, 295.

In cases otherwise doubtful, the test of who is the real taxpayer, made ultimately liable for payment, would seem in principle to provide a sound approach. Where the real taxpayer is the contractor or other person who deals with the United States, the state is fortified in its contention that the contractor, in common with other private individuals, is merely being required to contribute his share of the cost and burdens of community life. Any reverberations reaching the Government are transmitted by forces other than the exertion of state power, and it is no doubt a sensible view that

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[26] The fact that the bank's immunity was rested on an Act of Congress, exempting it from "State, municipal, and local taxation," rather than upon the Constitution unimplemented by congressional action, is immaterial for present purposes. In other cases, likewise, the Court has recognized (*Colorado Bank* v. *Bedford*, 310 U. S. 41, 52) that—

> The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself.

See *Stahmann* v. *Vidal*, 305 U. S. 61; *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, 43, 49; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 361–362, 363–364.

in dealing with private persons the Government must take the situation, as to them, as it finds it. If, due to a use of the cost-plus-a-fixed-fee type of contract or some similar device, the reverberations on the Government are more direct than in the normal case, this is still the consequence not of state action but of the Government's election to do business in that manner. Congress, if it chose, could doubtless make express provision for that situation. See *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. at pp. 271–279; *Alabama* v. *King & Boozer*, 314 U. S. at p. 8; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95. But the considerations are quite different where the real taxpayer is not the contractor but the person in the position of the United States. Any claim that the contractor is merely being called upon to bear his share of the costs and burdens of government lacks foundation, for the contractor is but a conduit for the imposition of the costs and burdens of government upon some one else. Even where the state elects to proceed against the contractor, or even disclaims the right to proceed against the Government or its property, the practical needs for the immunity are apparent. It is still the Government's property which is directly and immediately diverted to state purposes, and it is the Government which is saddled with the problems of compliance.

As we have seen (*supra*, pp. 25–27), the real taxpayer in Pennsylvania is the owner of the prop-

erty, the person in the position of the United States here, although the tax may be collected in the first instance from the record title holder. Under the principle of the recent decisions just reviewed, such a tax is invalid as applied to the Government's property. Moreover, the state law cannot be saved by so applying it as to deny Mesta a remedy of reimbursement because it does business with the United States rather than with a private person (*supra*, pp. 28–31). For this is to impose an ultimate liability upon Mesta, solely because of its dealing with the Government, which is not imposed upon other contractors. The Government, it is true, could neutralize this discrimination by paying the tax, and thus place itself upon an equal footing with other property owners in the state. But the state has no authority under the Constitution to place the Government on an equal footing with other property owners, whether the tax is collected directly or ultimately from it. Hence, the test is whether the state law in normal operation makes the property owner the real taxpayer. Since it does, the tax is invalid, absent congressional consent, where, as here, the Government is the property owner.

The attitude of Congress.—It is clear that Congress, like the states (*supra*, p. 33), has "accommodated its legislation" to the chain of decisions of this Court declaring invalid the assessment of taxes on Government property. It has, in gen-

eral, assumed that absent action on its part the Government's property is immune from state and local taxation. When deeming such action expedient, Congress has by express statute permitted the taxation of some specific property,[27] or has expressly authorized payments in lieu of taxes.[28] The contract with Mesta was authorized under the Act of July 2, 1940, c. 508, 54 Stat. 712. There can be no contention that Congress by this or any other act has waived the immunity of the machinery which is included within the instant assessment.

The understanding of Congress that Government property is immune under the Constitution

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[27] Within the course of only three Congresses (73rd to 75th), Congress waived in 9 Acts the immunity of various federally-owned real estate and personal property. Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128; Act of June 18, 1934, c. 585, 48 Stat. 993; Federal Credit Union Act, c. 750, 48 Stat. 1216; National Housing Act, c. 847, 48 Stat. 1246; Act of March 12, 1936, c. 138, 49 Stat. 1160; Act of April 17, 1937, c. 108, 50 Stat. 68; Act of August 25, 1937, c. 772, 50 Stat. 806; Farm Credit Act of 1933, c. 98, 48 Stat. 256; Bankhead-Jones Farm Tenant Act, c. 517, 50 Stat. 522.

[28] In many instances Congress has authorized the United States or its agencies to pay certain amounts to states or to local taxing units in lieu of taxes. Act of May 18, 1933, c. 32, 48 Stat. 58; Act of April 13, 1934, c. 116, 48 Stat. 576; Act of June 29, 1936, c. 860, 49 Stat. 2025; Act of June 29, 1936, c. 868, 49 Stat. 2035; Second Deficiency Appropriation Act, fiscal year 1937, c. 277, 50 Stat. 263; Bankhead-Jones Farm Tenant Act, c. 517, 50 Stat. 522; Interior Department Appropriation Act, 1938, c. 570, 50 Stat. 564; Act of August 28, 1937, c. 876, 50 Stat. 874; United States Housing Act of 1937, c. 896, 50 Stat. 888.

from state and local taxation, and its unwillingness at least thus far to waive the immunity with respect to property owned directly by the Government and utilized in the war program, are underscored by the history of certain proposed legislation. In July 1942, the Senate adopted a Bill (S. 2308, 77th Cong., 2d Sess.), providing that all real property which had been acquired by the United States since January 1940 for military purposes should remain subject to taxation by the state and political subdivisions where located, in the same manner as privately owned property situated there. The Bill was sent to the House, referred to the Committee on Public Lands on July 6, 1942,[9] and died there. The failure of this Bill is the more significant when its narrow scope is considered. Since June 1940, under the exigencies of the war, large tracts have been condemned for military purposes and it was intended that—

> "The bill would merely relieve the distressed counties and States which heretofore collected taxes from the private owners. The burden would be thrown upon the Government to meet the county and State taxes, so as to enable the counties and States to continue the normal administration of their affairs."[10]

Thus it appears that Congress has refused to place upon the Federal Government the burden of

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[9] 88 Cong. Record, Part 5, p. 6002.

[10] 88 Cong. Record, Part 5, p. 5923.

taxes on property but recently removed from the local tax rolls. The property here involved is, of course, in an entirely different category. It was never a source of revenue to the State of Pennsylvania or to Allegheny County.[31]

After meeting this fate in the 77th Congress, the Bill was reintroduced in identical or substantially similar form nine times in the 78th Congress, once in the Senate,[32] where it was reported,[33] but not passed, and eight times in the House,[34] where it was always referred to the Committee on Public Lands and not reported back. In addition a bill[35] has been introduced in the 78th Congress to permit taxation of *all* Government-owned property, and another[36] is now pending before the House which excepts only court houses, post offices, customs houses, and the like. Four bills have been introduced in the Senate[37] and five in the House[38] to provide for payments to local taxing units by the United States in lieu of taxes.

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[31] The record shows (R. 25, 31) that Allegheny County did obtain out of this contract some new property which undoubtedly is and will continue to be subject to taxation, in the form of the building owned by Mesta, which was erected to house the machinery.

[32] S. 249, 1st Sess.

[33] 89 Cong. Record, Part 7, p. 4851.

[34] H. R. 1288, 1305, 1578, 1658, 2246, 2338, 2724, 3166, all 1st Sess.

[35] S. 436, 1st Sess.

[36] H. R. 3359, 1st Sess.

[37] S. 32, 73, 1018, and 1375, all 1st Sess.

[38] H. R. 507, 1392, 2122, 3119, and 3161, all 1st Sess.

Whether any of these measures will become law it is impossible to say. It is to be presumed that they will receive the careful study of appropriate congressional committees, which are able to make independent investigation to discover the particularities of the problem and to fit the relief to the needs.

The problem is one of tremendous complexity, arising from varied conditions, and probably cannot be settled by a general legislative rule. This was a point emphasized by the Federal Real Estate Board [39] in a recent report issued after four years of study of the situation of communities adversely affected by the loss of revenue on land purchased or acquired by the Federal Government.[40] The Federal Real Estate Board believes that a further program of contributions in lieu of taxes would be warranted with respect to some classes of property, including property acquired by the War Department, where there has been a demonstrated loss of revenue to the local taxing unit without compensating benefits (Report, pp. 17–19). It is of the opinion, however, that the Federal Gov-

[39] The Board, created by Executive Order No. 8034 of January 14, 1939, was composed of one representative each of the Departments of Justice, Interior, Agriculture, Commerce, War, and Navy, and of the Bureau of the Budget, the Tennessee Valley Authority, and the Federal Works Agency.

[40] *Report on Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate*, Washington (1943), published as House Document No. 216, 78th Cong., 1st Sess., pp. 1–4. We hereafter cite this study as "Report."

ernment "should retain its legal exemption from the jurisdiction of State and local tax authorities", pointing to the "grave administrative difficulties," among other considerations, which any contrary policy would present (Report, p. 12). The Board states that "Federal aids to the States far exceed any reasonable estimate of obligations with reseect to real estate ownership" (Report, p. 10). Moreover, even where some local taxing units suffer, "the direct benefits from Federal projects to the State at large or to certain of its local districts may exceed the aggregate tax loss to all" (Report, p. 14). In such situations the states themselves are in a position to aid the political subdivisions adversely affected without the intervention of the Federal Government (Report, pp. 14–15).

The volume of Federal expenditures requires no elaboration and their effect on state finances is indicated by the table which we have included in Appendix B, *infra,* p. 60–61, reflecting the steady and substantial increase in state revenues since the inception of the national defense program. It would seem to be a matter of fair legislative debate whether, or to what extent, the financial burdens of the nation should be further increased by the claims of need on the part of local taxing units.

The scope of the general problem is enormous. In terms of the present controversy, a survey discloses that the United States at the present time owns, in the continental United States, through the War Department, the Navy Department, and the United States Maritime Commission alone, machinery, equipment and buildings located on private lands, under contracts with private corporations similar to the Mesta contract, in a total value of approximately two billions of dollars. Of this, property of a value approximating $257,500,000 is situated within Pennsylvania. In addition, in the continental United States, through these agencies alone, the Government owns entirely, including the land and improvements, facilities valued at nearly 5½ billions of dollars which are operated by private contractors.[41] These facilities might be assessed to the contractor upon the theory of the Pennsylvania court that an assessment is valid if not levied upon or collected

[41]

	Cost of Government owned facilities located on privately owned lands in the United States	Cost of Government owned facilities located on privately owned lands in Pennsylvania	Cost of facilities owned entirely by the United States but operated by private contractors
War Department	$760,000,000	$80,000,000	$4,760,000,000
Navy Department	895,000,000	170,000,000	393,000,000
Maritime Commission	261,500,000	7,500,000	290,500,000
	1,916,500,000	257,500,000	5,443,500,000

The foregoing information has been supplied to us by the War and Navy Departments and the Maritime Commission.

from the United States.[42] The Government and its contractors are now confronted with numerous assessments already entered against Government property in Pennsylvania and elsewhere and, if the present decision is allowed to stand, it seems likely that a substantial portion of the 7½ billion dollar valuation will be taxed.[43]

The character of the problem brings still further support, we believe, to the long line of decisions of the Court sustaining the immunity of Government property from state and local taxation except where Congress has consented. The Federal Government has not been unsympathetic in the past to the financial needs of state and local governments. The question of the relief to be afforded is peculiarly within the competence of the legislative branch of the Government. Congress under the decisions of the Court has long understood that absent action on its part Federal property is immune from state and local taxation. After study of the problem, remedies to meet particular situations have been adopted in the form of legislation.

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[42] Six such assessments have been made in California and one in Massachusetts.

[43] Between the entry of the present assessment against Mesta and the preparation of this brief, the Department of Justice was advised of 79 assessments in 10 states. These figures include the seven assessments referred to in footnote 42.

In summary, it seems clear in the light of all of the considerations that the Pennsylvania tax as here applied cannot be sustained. It is not a tax upon the contractor's property, nor is it an excise on his business or income. It is an *ad valorem* real property tax unambiguously imposed and measured upon the property of the United States. Every practical reason for the Government's immunity is present, not because of any contract but because it is the Government's property which is involved. At least since *Van Brocklin* v. *State of Tennessee, supra,* it has not been doubted that a tax upon the Government's property is invalid, even when collected from someone else.

Moreover, if it were not enough that the tax is an *ad valorem* tax on the Government's property, a further fact requires reversal of the judgment below. Approaching the problem from the other end of the scale—from the standpoint of the competing interest of the states and their political subdivisions in the maintenance of tax sources and the imposition of equal burdens on all bound to their support—the Court has sustained various excises on the business and income of a person who deals with the Government. These have been valid notwithstanding incidental reverberations transmitted to the Government. But in all of these cases the exaction was on the private per-

son; in none did the exertion of state power reach the person in the position here of the United States. When the contrary was true, the statute as so applied was held invalid. It was not saved because the state proceeded for collection against, or otherwise sought to bring its power to bear upon, the private person. The scheme of the Pennsylvania law is not to tax the contractor for property owned by another, but to tax the real owner. Thus, nothing in the decisions sustaining a tax or regulation, or in the policy underlying them, can support the state tax in its present application. The record titleholder, such as Mesta, is not called upon to pay the tax as a measure of its obligation of support to local government. The tax is on the real owner of the property, and it is his obligation of support which the tax measures.

Nor is the tax saved by the device of failing to give persons who deal with the Government the same remedy of reimbursement against the real owner of the property which is given to all others. On its face, this is a discrimination solely because of dealings with the Government, and a discrimination which can be neutralized only by the Government's paying the tax. This would put the Government on the same level as private property owners within the state, but it is precisely this level to which the Government may not be reduced by state action. The test must be whether the state law, absent any question of immunity, makes the

property owner the real taxpayer. Since it does here, the tax is invalid as applied to the Government's property.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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JANUARY, 1944.

APPENDIX A

Pennsylvania Act of May 22, 1933, P. L. 853, as amended by the Act of July 2, 1941, P. L. 219:

SECTION 201. Subjects of Taxation Enumerated.—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:

(a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation.

* * * * *

(See 72 Purdon's Statutes (1936) 5020-201.)

Act of June 4, 1901, P. L. 364:

SECTION 2. All taxes which may hereafter be lawfully imposed or assessed on any property in this Commonwealth, in the manner and to the extent hereinafter set forth, shall be and they are hereby declared to be a first lien on said property, together with all charges, expenses and fees added thereto for failure to pay promptly; and such liens shall have priority to, and be fully paid and satisfied out of the proceeds of any judicial sale of said property before any other obligation, judgment,

claim, lien or estate with which the said property may become charged, or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made.

(53 Purdon's Statutes (1936) 2022.)

Act of April 3, 1804, P. L. 517:

SEC. 6. *And be it further enacted by the authority aforesaid,* That every tenant who may or shall occupy or possess any lands or tenements, shall be liable to pay all the taxes which during such occupancy or possession may thereon become due and payable; and having so paid such taxes, or any part thereof, it shall be lawful for him, by action of debt or otherwise, to recover said taxes from his landlord, or, at his election, to defalcate the amount thereof in the payment of the rent due to such landlord, unless such defalcation or recovery would impair any contract or agreement between them previously made.

(72 Purdon's Statutes (1936) 5791.)

APPENDIX B

TOTAL STATE TAX COLLECTIONS, BY STATES: 1939–1943 [1]

[In thousands of dollars]

[Prepared from *State Finances* published by the Bureau of the Census, Governments Division, Department of Commerce]

United States	1939	1940	1941	1942	1943
Total	3,049,672	3,312,644	3,597,193	3,898,812	3,999,793
Alabama	40,764	45,844	51,405	51,043	61,280
Arizona	14,396	18,551	17,989	23,765	24,119
Arkansas	28,130	30,844	33,486	40,879	42,331
California	237,768	258,732	287,597	333,475	355,483
Colorado	31,627	33,798	37,323	38,484	41,640
Connecticut	38,517	44,420	50,474	57,784	55,562
Delaware	9,438	10,603	10,626	10,825	11,492
Florida	49,218	51,937	60,650	59,793	50,111
Georgia	40,601	45,923	50,876	58,793	57,786
Idaho	10,970	11,643	12,858	13,077	13,503
Illinois	186,781	197,495	210,249	230,969	216,569
Indiana	70,445	80,206	85,337	95,701	90,437
Iowa	62,358	63,367	67,134	70,870	66,211
Kansas	26,270	38,011	40,114	44,411	48,391
Kentucky	41,195	43,470	49,299	54,515	49,306
Louisiana	68,949	74,895	76,712	81,130	86,289
Maine	19,141	20,542	21,149	22,961	21,426
Maryland	33,046	44,414	47,047	47,938	49,936
Massachusetts	104,762	121,635	125,066	124,115	133,503
Michigan	132,783	149,597	172,161	183,902	179,214
Minnesota	69,889	78,892	76,752	91,350	93,212
Mississippi	27,389	30,708	33,495	42,379	45,279
Missouri	69,189	72,819	83,211	82,670	84,768
Montana	11,801	11,610	12,077	14,145	13,865
Nebraska	22,761	22,613	22,634	23,660	23,364
Nevada	3,613	3,654	3,878	4,649	4,524
New Hampshire	10,436	12,989	13,072	13,478	11,588
New Jersey	116,862	96,736	95,694	104,719	100,703
New Mexico	14,318	15,678	17,093	18,299	18,716
New York	416,215	432,870	488,234	485,887	460,456
North Carolina	68,111	76,257	86,889	99,018	103,516
North Dakota	9,754	13,853	15,357	18,546	17,814
Ohio	195,853	198,441	227,874	228,494	223,853
Oklahoma	55,853	55,856	56,682	73,537	71,953

[1] Includes sales, use, gross receipts, license, privilege, income, property inheritance, gift, severance, poll, and stock transfer taxes.

United States	1939	1940	1941	1942	1943
Oregon	23, 108	25, 870	28, 825	35, 847	39, 765
Pennsylvania	221, 886	253, 181	272, 889	290, 502	274, 506
Rhode Island	14, 477	15, 864	16, 093	17, 051	20, 854
South Carolina	31, 525	31, 411	35, 914	44, 692	46, 147
South Dakota	16, 099	15, 321	16, 454	14, 839	15, 169
Tennessee	38, 837	43, 349	46, 031	54, 575	51, 455
Texas	107, 959	126, 855	127, 467	137, 574	156, 588
Utah	15, 108	17, 034	18, 307	20, 511	22, 191
Vermont	9, 658	10, 307	10, 806	11, 253	10, 005
Virginia	44, 378	46, 916	57, 267	65, 423	61, 839
Washington	83, 326	60, 487	63, 978	90, 124	94, 511
West Virginia	41, 854	47, 250	51, 268	56, 788	53, 686
Wisconsin	75, 905	83, 236	93, 667	110, 466	117, 312
Wyoming	7, 152	6, 978	7, 602	7, 386	7, 558

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